

Living with COVID-19: Contemporary ways of working and obligations

SUMMARY

Due to the impacts of the Pandemic, employers have needed to consider new ways of working and the associated issues that arise from it.

This advice sets out some different ways of contemporary working, while highlighting employer obligations under workplace laws.

What is Ai Group observing in contemporary ways of working, now that many COVID-19 health orders and restrictions have eased around the country?

With regard to office workers, Ai Group has observed an increase in employers requesting that their employees return to the office in some capacity, often as part of a hybrid work arrangement. Some common working arrangements Ai Group is observing include:

The traditional pre-Pandemic approach: working from the office with exceptions as agreed between the employer and employee.

There appear to be a variety of common business and operational reasons for this including:

- Teams that require frequent interaction where face-to-face is an ideal mode to facilitate this;
- The utilisation of office space which a business has leased;
- Difficulties with conducting training when employees are working remotely;
- A sense or actual greater operational certainty and productivity; and
- A sense of treating everyone the same, subject to exceptions.

The “Free-Range” approach: providing full choice to employees to nominate when they would like to work from an office location or at home – including without notice.

Factors that lead to this approach include:

- Some employers have observed optimal team or organisational performance and productivity when employees work remotely;
- Changes in office leasing and space arrangements;
- High levels of trust and autonomy in how people work. (This can be job specific to those employees for whom remote work and flexibility are conducive);
- The presence of national or geographically dispersed teams and the need to be inclusive and productive via technological connections rather than physical connections;

- Utilising maximum / free range flexibility as a key recruitment and retention tool amidst skill shortages and the demand for talent; and
- To manage work health and safety (**WHS**) risks.

The Hybrid Roster: where employees may be rostered to work on specific day/s nominated by the employer.

Motivations for this arrangement include:

- Compliance with any relevant public health orders or to satisfy broader WHS duties to provide a safe workplace and minimise risk of infection and illness at work – including minimising large scale physical contact with others at work.
- Providing operational certainty to ensure specific team-based work functions operate at optimal levels;
- Ensuring team interaction to stimulate both necessary and incidental communication and innovation – particularly for localised teams; and
- Managing limited office space.

The Hybrid Roster with choice: where employees attend an office on a set number of days per week with the employee exercising a choice as to what those days will be. This has also resulted in the rise of the Tuesday to Thursday (TWT) worker.

Motivations for this approach include:

- Stimulating organic and incidental team and cross-team interaction while recognising that many people's lives and commitments have changed and are now built around Working From Home (**WFH**) or greater workplace flexibility.
- Creating a balanced approach with high levels of flexibility for the purpose of talent attraction and retention and a desire or need for face-to-face interactions.
- Providing team-driven "anchor days" for staff to have time to discuss workflow and functions which works well for localised teams.

Whichever working arrangement is preferred, it is important employers consider their workplace obligations and determine how these should be managed.

In circumstances where employees are working remotely, can an employer require their employees to return to the usual workplace?

Employers can require (or direct) their employees to return to the usual workplace, provided the requirement is lawful and reasonable. What is lawful and reasonable will depend on the circumstances of each case.

Employers who have a written contract of employment with an employee specifying a work location and/or providing for the employee to work at a different location may rely on that contract of employment but should also consider a range of other exceptions and limitations that may apply.

These include:

- The application of any relevant Public Health Orders requiring an employer to allow its employees to work from home where practicable (or similar);
- The application of WHS laws and whether the direction would result in an outcome inconsistent those laws, particularly in relation to ongoing COVID-19 risks;
- Whether the employee requested flexible work arrangements under section 65 of the *Fair Work Act 2009* (Cth) (**FW Act**) due to their caring responsibilities? (See below). If so, the employer cannot unreasonably refuse the request; and
- Whether a requirement to attend the office or other workplace at this time indirectly discriminates against the employee due to a protected attribute (e.g. a disability, a caring responsibility, etc).

Which employees have a right to request a flexible work arrangement under the FW Act?

Under section 65 of the FW Act, some employees are eligible to request flexible work arrangements including a change in work location, such as working from home. An employee can make this request if the employee:

- is the parent, or has responsibility for the care, of a child who is of school age or younger;
- is a carer, within the meaning of the *Carer Recognition Act 2010* (Cth);
- has a disability;
- is 55 or older;
- is experiencing violence from a member of the employee's family; or
- provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

Employers have the right to refuse the request on reasonable business grounds such as:

- The requested arrangements are too costly;
- Other employees' working arrangements cannot be changed to accommodate the request;
- It is impractical to change other employees' working arrangements or hire new employees to accommodate the request;
- The request would result in a significant loss of productivity or have a significant negative impact on customer service.

Can an employer offer employment to new employees requiring the employee to work remotely?

Generally speaking, employers can offer employment to new employees requiring the employee to work remotely, provided that the employer can meet its WHS obligations and comply with other workplace laws.

For example, a private home where an employee is performing work is generally an extension of the workplace for the purpose of WHS legislation. Employers should satisfy themselves that the remote location is safe for the employee to be working in.

In addition, employers should also be able to demonstrate compliance with modern awards or enterprise agreements applying to employees, including where employees work remotely. This includes the hours worked by employees and the relevant rates of pay, allowances, penalties or loadings that may be payable. Pay record-keeping requirements under the FW Act and *Fair Work Regulations 2009* apply to remote work arrangements.

Recent Industrial Commission decisions regarding disputes about remote working arrangements

Ruth Cully v Commonwealth of Australia (represented by the Australian National Audit Office) [2022] FWC 495 (7 April 2022)

This recent Fair Work Commission (FWC) decision concluded that while employers can direct employees to attend the workplace following a period of remote working, the direction must be both lawful *and* reasonable.

The case concerned an employee who requested a WFH arrangement based on her medical status of being vulnerable to the serious effects of COVID-19 infection and because she was required to care for her terminally ill uncle. She requested to work from her second home in Coffs Harbour whilst her workplace was in Canberra. Her employer initially approved the arrangement. During this period, the employee also applied for periods of personal/carers and other forms of leave to care for her uncle, resulting in periods of absence from work.

The employee was later dismissed by her employer for taking two periods of unauthorised leave and failing to comply with a lawful and reasonable direction to perform work at her employer's office in Canberra. The employee filed an unfair dismissal application in the FWC.

The FWC held that there was no valid reason for the termination and found in favour of the employee. The reason for the decision was that whilst her employer had made a lawful direction that the employee attend the workplace to perform her duties in Canberra, the direction was not reasonable in the circumstances. This was because the employee had demonstrated through medical evidence that she had an elevated risk to COVID-19 and had caring responsibilities to her uncle, whom the FWC found was an immediate household member for the purpose of the employee's carer's leave entitlement. The FWC also found that her employer did not have reasonable business grounds to revoke the WFH arrangement and had not raised any performance issue with her.

The case highlights that while employers have a general right to lawfully and reasonably direct where an employee works, this is not the same as a unilateral right to require somebody to return to the office in all circumstances.

Hair v State of Queensland (Queensland Health) [2021] QIRC 422 (10 December 2021)

In this decision, the Queensland Industrial Relations Commission upheld the employer's decision to refuse an employee's request for remote WFH arrangements.

The employee requested to work remotely from interstate for personal reasons. The employee believed it was a justifiable arrangement given her role had been performed entirely remotely since March 2020 and performance was meeting and exceeding expectations. The employer declined the employee's request given the nature and key accountabilities of the employee's role required timely face to face interactions when providing services to clients, and the potential for disproportionate pressure on colleagues.

The Commissioner's decision took into account the way that work had been undertaken over the past 18 months, the emerging needs of the employer and the practicalities of the proposed arrangement. The Commissioner upheld the employer's decision to refuse the remote WFH arrangement

For further information or assistance, please contact Ai Group. Ai Group has set up a [special section on our website](#) to provide access to Ai Group advice and assistance relating to the COVID-19 pandemic and the recovery from the pandemic.

A handwritten signature in black ink, appearing to read 'S. Smith'.

Stephen Smith
Head of National Workplace Relations Policy